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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92056317
Party	Defendant Top Gun Intellectual Properties, LLC
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

COCKPIT USA, INC.,)	
)	
Petitioner,)	Cancellation No. 92056317
)	Registration No. 2817325
v.)	
)	
TOP GUN INTELLECTUAL)	
PROPERTIES, LLC,)	
)	
Registrant.)	
)	

**REGISTRANT’S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

Pursuant to 37 C.F.R. §2.127, Rule 12(b)(6) of the Federal Rules of Civil Procedure, and TBMP 503, Registrant Top Gun Intellectual Properties, LLC hereby submits this Reply Brief in support of its motion to dismiss the Petition for Cancellation (“Petition”) filed by Petitioner Cockpit USA, Inc., for failure to state a claim upon which relief can be granted.

I. Preliminary Statement

Clearly recognizing its deficiencies in pleading fraud under Rule 9(b), Petitioner resorts to arguing that Registrant misapplies and misunderstands the law. Yet, it is Petitioner that clearly misapplies the law. Contrary to Petitioner’s contentions, it is not free to assert a claim of fraud that has no factual underpinning and then rely on discovery in the hope of finding some support for the claim. Moreover, Petitioner’s assertion that the purpose of Rule 9(b) is nothing more than a notice requirement is manifestly incorrect. As the Board itself has recognized, the purposes of the Rule 9(b) heightened pleading standard also include weeding out baseless claims,

preventing fishing expeditions and fraud actions in which all facts are learned after discovery, and serving the goals of Rule 11 Fed. R. Civ. P. Asian and Western Classics B.V. v. Lynne Selkow, 92 USPQ2d 1478, 1478-79 (T.T.A.B. 2009), citing Wright & Miller, Federal Practice and Procedure, 5A §1296 n. 11 (2004).¹

Additionally, throughout its Opposition to the Motion to Dismiss, Petitioner argues that Registrant is assuming and arguing facts. This is plainly incorrect. Any reasonable reading of the brief in support of the Motion to Dismiss reveals that Registrant is arguing the absence of necessary facts to support the asserted claims. The purpose of a motion to dismiss is to challenge the sufficiency of the pleading. That is all that Registrant has done.

II. The Fraud Claims Based on the Section 8 and 15 Declarations Should Be Dismissed

Contrary to Petitioner's contention, the Petition does not meet the requirements of Rule 9(b) with respect to the fraud claims directed to the Section 8 & 15 declarations. The Petition alleges fraud committed by Registrant in filing the Section 8 & 15 declarations based on the allegation that the mark was not in use on all of the specified goods, yet Petitioner fails to identify which goods on which the mark was not allegedly used, and now tries to justify such deficient pleading by arguing that the information is within the knowledge of Registrant. The allegation that the declaration was fraudulent because the mark was not used on all of the goods is not sufficient under Rule 9(b). It is vague, it is devoid of any factual underpinning, it fails to

¹ Likewise, in Scorpiniti v. Fox Television Studios, Inc., 104 U.S.P.Q.2 1936, 2012 WL 5905062, * 4 (N.D. Iowa 2012), one of the cases that Petitioner erroneously relies on in support of its deficient pleading, the district court quoted an Eighth Circuit decision which clearly stated that the notice requirement is “**one of the primary purposes**” of Rule 9(b) (emphasis added).

put Registrant on notice of the claim, and it is precisely the type groundless claim that Rule 9(b) is intended to preclude.

In arguing that the pleading is sufficient under Rule 9(b), and in relying on a district court case in support thereof, Petitioner completely ignores controlling authority which requires that, under Rule 9(b), the pleadings must contain explicit rather than implied expression of the circumstances constituting the fraud, Asian and Western Classics, 92 USPQ2d at 1478, quoting King Automotive, Inc. v. Speedy Muffler King, Inc., 667 F.2d 1008, 212 USPQ 801, 903 (CCPA 1981), and that, although Rule 9(b) allows that intent may be alleged generally, the pleadings must allege sufficient underlying facts from which a court may reasonably infer that a party acted with the requisite state of mind. Asian and Western Classics, 92 USPQ2d at 1479, citing Exergen Corp. v. Wal-Mart Stores, Inc., 575 F.3d 1312, 1329 n.5, 91 U.S.P.Q.2d 1656 (Fed Cir. 2009). As stated by the Board in Asian and Western Classics, “allegations based solely on information and belief raise only the mere possibility that such evidence may be uncovered and do not constitute pleading fraud with particularity.” 92 USPQ2d at 1479.

Moreover, even in Scorpiniti, the court recognized that, while knowledge and intent may be pled generally, Rule 9(b) nevertheless requires that the circumstances constituting the fraud be pled with particularity. 104 U.S.P.Q.2 at 1939. Thus, contrary to Petitioner’s assertion, the identity of the goods that the mark was allegedly not in use on, at the time Registrant made the allegedly false declarations, is part of the “what” of the alleged fraud, and is not the type of fact that is “peculiarly within the opposing party’s knowledge,” and may therefore be left to be learned through discovery. Rather, such facts constitute the very circumstances of the alleged fraud and must be pled with particularity.

Moreover, as noted above, one of the purposes of Rule 9(b) is to prevent such fishing expeditions. Indeed, as the Federal Circuit has stated, “[t]he discovery rules are designed to assist a party to prove a claim it reasonably believes to be viable *without discovery*, not to find out if it has any basis for a claim.” Micro Motion, Inc. v. Kane Steel Co., Inc., 894 F.2d 1318, 1327 (Fed. Cir. 1990) (emphasis in original).

Accordingly, if Petitioner is unable to allege which goods the mark is or was allegedly not used on, then it does not have a good faith basis for alleging that the declarations were false, let alone fraudulent. In short, Petitioner’s assertion that it needs to obtain such information from Registrant is a tacit admission that its fraud claim lacks basis and should be dismissed. Indeed, Petitioner’s vague allegation does not permit the Board “to infer more than the mere possibility of misconduct,” and dismissal is therefore appropriate. Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009).

Additionally, Petitioner’s reliance on Scorpiniti, 104 U.S.P.Q.2d 1936, and Meckatzer Lowenbrau Benedikt Weib KG v. White Gold, LLC, 95 U.S.P.Q.2d 1185 (TTAB 2010), for its contention that its pleading is sufficient, is without basis. Unlike the Petition in this case, the allegation of fraud in Scorpiniti – in paragraph 14 of the pleading -- specifically identified the services with respect to which the mark was allegedly not used, namely television broadcast services. 104 U.S.P.Q.2d at 1939. Likewise, in Meckatzer, the allegation of fraud was premised on both an actual investigation that the plaintiff undertook, and the specific allegation that the mark was not used on any of the goods identified in the registration, except vodka. 95 U.S.P.Q.2d at 1187. Thus, unlike the present Petition, the claims of fraud in those cases were sufficiently pled with particularity. Petitioner’s argument that it need not identify the goods on which the mark was allegedly not used is therefore entirely unsupported.

Accordingly, the claims of fraud directed to the Section 8 & 15 declarations are not well-pleaded and the allegations clearly fail to raise a right to relief above the speculative level, as required under Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Indeed, it is perfectly clear that Petitioner's claims are wholly made up and therefore violate Rule 11.

With respect to Petitioner's request to amend the Petition to specify which goods the mark was allegedly not used on, the request should be denied because the amendment is futile.² Not only has Petitioner already admitted that it needs discovery of Registrant in order to obtain such information, but Petitioner has also admitted in its brief that the only basis on which it could amend the claim is the review of Registrant's website that it undertook when drafting and filing the Petition, in October, 2012. However, amendment to incorporate allegations that the mark was not in use on certain goods, based on Petitioner's review of Registrant's website at the time that the Petition was filed, would be futile, because the claim would be legally deficient. It is the time that the declarations were made that is relevant, not the time that the Petition was filed.

² A motion to amend pursuant to Rule 15(a) may be denied if the proposed amendment would be futile. Kemin Foods, L.C. v. Pigmentos Vegetales Del Centro S.A., 464 F.3d 1339, 1352 (Fed. Cir. 2006), citing Foman v Davis, 371 U.S. 178, 182 (1962). "When a party faces the possibility of being denied leave to amend on the ground of futility, that party must demonstrate that its pleading states a claim on which relief could be granted, and it must proffer sufficient facts supporting the amended pleading that the claim could survive a dispositive pretrial motion." Kemin Foods, 464 F.3d at 1355-56; Bethany Pharmacal Co. v. QVC, Inc., 241 F.3d 854, 861 (7th Cir. 2001) (An amendment is futile if the added claim would not survive a motion for summary judgment); Islamic Society of Fire Department Personnel v. City of New York, 205 F.Supp.2d 75, 80 (S.D.N.Y. 2002) (appropriate to deny leave to amend where proposed amendment could not withstand a motion for summary judgment).

Specifically, for the declaration to be false, and for the claim of fraud to be legally valid, Petitioner needs to allege that the mark was not in use on specific goods covered by the registration at the time the declarations of use and incontestability were made, namely September 10, 2009. By its own admission, Petitioner has no factual basis for making such allegations, since it admits that it can only amend the pleading based on the alleged absence of certain goods appearing on Registrant's website at the time that the Petition for Cancellation was filed, more than three years after the date that the declarations of use and incontestability were made. By its own admission, therefore, Petitioner has no factual basis that the declarations were false at the time that they were made on September 10, 2009, let alone that they were made with an intent to deceive.

Moreover, by admitting that its proposed amendment would be based on its review of Registrant's website when drafting the Petition, it is clear that Petitioner made no meaningful effort to determine whether, in fact, the mark was in use on all goods identified in the registration, prior to filing its original petition, either by visiting Registrant's retail stores or by otherwise conducting a use investigation. This clearly evidences the fact that the allegations of fraud are nothing more than an attempt to avoid the consequences of Petitioner's failure to oppose or seek cancellation based on its alleged prior rights in a timely manner. This case is therefore a perfect example of why strict adherence to Rule 9(b) pleading requirements are necessary in order to preclude the casual assertion of unfounded allegations of fraud.

III. The Fraud Claim Pertaining to the Trademark Application Should be Dismissed

In response to the clear implausibility of Petitioner's claim that Registrant's oath was false because it knew that Petitioner had the right to use the mark, Petitioner resorts to backtracking from the allegation that Registrant knew that Petitioner had such right, and arguing

instead that Registrant knew that “someone” had the right to use the mark.³ Yet, such allegation is even more legally deficient, as it renders the claim vague. According to Petitioner, Registrant allegedly committed fraud because it allegedly knew that some unspecified person or entity had a right to use the mark. This totally fails to meet the particularity requirement of Rule 9(b) and only serves to underscore the frivolous nature of Petitioner’s claims.

Once again, it is clear that Petitioner’s claims of fraud are made in bad faith, without any underlying factual basis, in order to avoid the consequences of its failure to oppose registration of the mark or petition for cancellation of the registration based on prior use within the statutory time period. Petitioner’s failure to assert a prior right to use the mark only serves to underscore the lack of foundation for its fraud claim. In short, when all else fails, cry fraud. The Board should not condone such conduct.

Nevertheless, just as with Petitioner’s allegation that Registrant knew that Petitioner had the right to the use mark, which is plainly contradicted by Petitioner’s own allegations, the allegation that Registrant knew that “someone” had the right to use the mark does not form a sufficient basis for the Board to infer more than a mere possibility that Registrant made a fraudulent declaration. The same factual predicate is missing, since the claim still fails to allege any facts supporting the conclusory allegation that Registrant knew that someone else had the right to use the mark. In short, the allegation is insufficient for the Board to do more than speculate as to whether Registrant committed fraud on the basis that it allegedly knew that

³ Contrary to Petitioner’s assertion on page 7 of its brief, in no way has Registrant admitted in its motion that it was buying products identified with the TOP GUN mark from Petitioner prior to

(continued)

“someone” had a right to use the at the time it filed the subject application. The fraud claim should therefore be dismissed. See Ashcroft, 556 U.S. at 679, 129 S.Ct. at 1950 (“[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct,” dismissal is appropriate).⁴

IV. The Claim That the Mark TOP GUN is Generic Should be Dismissed

Petitioner mistakenly argues that Registrant argues the merits of the claim. To the contrary, Registrant has pointed out the infirmities in the allegations. Petitioner’s assertions as to the lack of case law supporting Registrant’s position is the last resort of one who has no meaningful response. To state any cause of action, facts meeting the legal standard must be alleged. Otherwise, it is legally deficient. Thus, Registrant is not arguing the merits of the claim. Rather, Registrant is arguing that the claim that the TOP GUN mark is generic is neither plausible nor sufficiently pled to state a claim for relief, as facts necessary to meet the legal standard have not been alleged.

(continued from previous page . . .)

filing its application. Rather, any use of the term that Petitioner may have made prior to or at the time that Registrant filed its application was descriptive, not as a trademark.


⁴ Petitioner argues that Registrant “bizarrely” argues that Rule 9(b) applies to Petitioner’s allegations of prior use of the mark. Registrant made no such argument and it is therefore Petitioner’s argument that is bizarre. Very clearly, Registrant argued that the allegation that Registrant committed fraud because it knew that Petitioner had the right to use the mark is not pled with particularity because there are no facts alleged to support the allegation that Petitioner even had the right to use the mark. If Petitioner cannot alleged facts supporting its alleged right to use the mark, it therefore cannot be found to have sufficiently alleged that Registrant knew that Petitioner had such right.

More specifically, the pleading fails because Petitioner's claim that the mark is generic is directly contradicted by its admission that its own use of the term TOP GUN was as a trademark (Petition ¶¶7 and 8). Claims contradicted by the facts alleged in the pleading itself are patently implausible. Petitioner does not respond to this argument, merely noting instead that Registrant cites no authority. But Registrant does cite authority, and the fact such authority is not a trademark case is irrelevant, as it is an issue of pleading under Supreme Court precedent, not an issue of trademark law. Moreover, the lack of authority in a trademark case is readily explained, as trademark claims are relatively straightforward and implausible trademark claims would therefore be rare. Indeed, it is only in a case such as this, in which a party claims both that it used a mark as a trademark, but that the mark is nevertheless generic, that an issue of implausibility arises.

Finally, Petitioner's reliance on Rule 8(d) as permitting pleading in the alternative is misplaced. Pleading in the alternative addresses seeking relief from alternative claims, and simply means that a court may not construe a plaintiff's first claim as an admission against another alternative or inconsistent claim. Independent Enters. v. Pittsburgh Water & Sewer Authority, 103 F.3d 1165, 1175 (3d Cir. 1997). That is not the case here. In other words, there is no issue of Petitioner's potential failure to prove fraud constituting an admission that the mark is not generic. Rather, it is plaintiff's own factual allegations which are contradictory, thereby rendering the claim that the mark is generic both implausible and legally deficient.

Dated: January 26, 2013

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CERTIFICATE OF SERVICE

I, the undersigned, Michael F. Sarney, hereby certify that, on the 26th day of January, 2013, I caused to be served a true and correct copy of:

**REGISTRANT'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

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